

SS-8 Determination—Determination for Public Inspection

Occupation 04MAN.120 Manager	Determination: <input checked="" type="checkbox"/> Employee <input type="checkbox"/> Contractor
UILC	Third Party Communication: <input checked="" type="checkbox"/> None <input type="checkbox"/> Yes

Facts of Case

Information provided indicates the firm is a non profit organization offering professional orchestra concerts and a variety of educational and outreach programs. The worker has been retained by the firm as their personnel manager since 2013 and continues to date. The firm has reported the income earned on Form 1099-MISC each tax year. The worker indicated she is also a musician in the orchestra, that position has not been requested on this SS-8. Therefore this determination will only apply to the income paid for services performed as the firm’s personnel manager.

There appears to have been no independent contract agreement. The worker provided a copy of the job description given to her by the firm, which outlines her duties and responsibilities. She was responsible to the Executive Director and responsive to the conductor and musicians. The worker is represented as the personnel manager on the firm’s website as [REDACTED]. Work assignments come from the Board of Directors and or the Conductor. The worker is required to submit spreadsheets showing musicians playing for specific concerts, various lists, and copies of signed musician’s contracts. There is no set schedule, only the expectation that all services expected are completed. The firm indicated her presence was requested at various Board meetings, no other requirements existed. (The job description states she is expected to attend all rehearsals and performances.) The firm assumes she performs her services from her home. The services are to be performed personally. The firm stated she was paid on a monthly basis, and her cell phone service was negotiated as part of her pay. She is reimbursed for minor expenses. The firm paid for the purchase of Adobe Contract signing software so musicians can electronically sign contracts. The clients pay the firm. Either party can terminate the work relationship without incurring a penalty or liability. The firm indicated she has requested to leave the position as personnel manager, but will continue to perform as a musician of the Symphony.

The worker stated she performed her services in accordance to the job description given to her by the firm. A copy of the job description was provided. The worker agreed work assignments came from the Executive Director and the music director. Copies of e-mails were also provided between the worker and firm, showing reports submitted, and requests of work to be accomplished. The worker indicated services were performed from a home office, concerts, rehearsals, business conducted over her smart phone (owned by the firm) etc., She was required to attend all meetings call by the Executive Director and/or Music Director. Her services were to be performed personally. She indicated she paid on salary. The customer paid the firm. She was provided business cards by the firm. All work was performed as a representative of the Symphony as their personnel manager.

The question of whether an individual is an independent contractor or an employee is one that is determined through consideration of the facts of a particular case along with the application of law and regulations for worker classification issues, known as “common law.” Common law flows chiefly from court decisions and is a major part of the justice system of the United States. Under the common law, the treatment of a worker as an independent contractor or an employee originates from the legal definitions developed in the law and it depends on the payer’s right to direct and control the worker in the performance of his or her duties. Section 3121(d)(2) of the Code provides that the term “employee” means any individual defined as an employee by using the usual common law rules.

Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to what is to be done, but also how it is to be done. It is not necessary that the employer actually direct or control the individual, it is sufficient if he or she has the right to do so.

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or independence must be considered. We must examine the relationship of the worker and the business. We consider facts that show a right to direct or control how the worker performs the specific tasks for which he or she is hired, who controls the financial aspects of the worker’s activities, and how the parties perceive their relationship. The degree of importance of each factor varies depending on the occupation and the context in which the services are performed.

ANALYSIS

A worker who is required to comply with another person’s instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so

Analysis

continued..

Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business.

A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed in frequently recurring although irregular intervals.

The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. If the nature of the occupation makes fixed hours impractical, a requirement that workers be on the job at certain times is an element of control.

A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control.

Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. In such instances, the firm assumes the hazard that the services of the worker will be proportionate to the regular payments. This action warrants the assumption that, to protect its investment, the firm has the right to direct and control the performance of the workers. Also, workers are assumed to be employees if they are guaranteed a minimum salary or are given a drawing account of a specified amount that need not be repaid when it exceeds earnings.

We have applied the above law to the information submitted. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, then, rests on the weight given to the factors, keeping in mind that no one factor rules. The degree of importance of each factor varies depending on the occupation and the circumstances.

Evidence of control generally falls into three categories: behavioral control, financial control, and relationship of the parties, which are collectively referred to as the categories of evidence. In weighing the evidence, careful consideration has been given to the factors outlined below.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, you retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your financial investment.

Factors that illustrate whether there is a right to direct and control the financial aspects of the worker's activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, the worker did not invest capital or assume business risks, and therefore, did not have the opportunity to realize a profit or incur a loss as a result of the services provided.

Factors that illustrate how the parties perceive their relationship include the intent of the parties as expressed in written contracts; the provision of, or lack of employee benefits; the right of the parties to terminate the relationship; the permanency of the relationship; and whether the services performed are part of the service recipient's regular business activities. In this case, the worker was not engaged in an independent enterprise, but rather the services performed by the worker were a necessary and integral part of your business. Both parties retained the right to terminate the work relationship at any time without incurring a liability.

CONCLUSION

Based on the above analysis, we conclude that the firm had the right to exercise direction and control over the worker to the degree necessary to establish that the worker was a common law employee, and not an independent contractor operating a trade or business. The firm presents symphony concerts to the general public. As part of the personnel manager's duties, she is responsible for contracting musicians, arranging seating positions, handling payroll, assists in developing the annual budget each year, hire extra players, maintains attendance records, provides timing for start and close and rehearsals etc. She works under the direction of the Executive Director and/or the Conductor. Her services are a necessary and integral part of the firm's business. She is paid on salary on a monthly basis, separate and apart from her services as a musician for the Symphony. (although all included on the same 1099-MISC Form.)

She is represented on the firm's website and their personnel manager.